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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

BASSEY DUKE, Plaintiff and Appellant, v. DAMERON HOSPITAL ASSOCIATION et al., Defendants and Respondents.	C081251 (Super. Ct. No. 39-2014-00308392-CU-OE-STK, STKCVUOE20140002183)

Following the termination of his employment, plaintiff Bassey Duke sued his former employer defendant Dameron Hospital Association (Dameron), alleging that "his termination was substantially motivated by his refusal to set up employees for termination at the request and instruction" of his immediate supervisor Doreen Alvarez.[1]

[1] Both parties and the trial court erroneously refer to Alvarez as a defendant. She is not named as a defendant in any of Duke's causes of action.

Duke's operative second amended complaint asserts causes of action for retaliation in violation of the California Fair Employment and Housing Act (the FEHA) (Gov. Code, § 12900 et seq.),[2] wrongful termination in violation of public policy, negligent supervision, and declaratory and injunctive relief.[3]

Dameron moved for summary judgment, or in the alternative summary adjudication. The trial court entered summary judgment in Dameron's favor. The trial court found that Duke could not establish that he engaged in a protected activity, a necessary element of his retaliation cause of action, or that Alvarez's conduct rendered her unfit or incompetent for her job, a necessary element of his negligent supervision cause of action. The trial court also concluded that Duke's wrongful termination cause of action, his claims for declaratory and injunctive relief, and his request for punitive damages were derivative of his retaliation and negligent supervision causes of action, and thus, could not survive summary judgment.

Duke appeals, contending that there are triable issues of material fact as to each of his causes of action, except negligent supervision, his claims for declaratory and injunctive relief, and his request for punitive damages. We agree in part. We shall direct the trial court to vacate its order granting the motion for summary judgment and to enter a new order granting the motion for summary adjudication on Duke's negligent supervision cause of action and request for punitive damages, but denying the motion for summary

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[2] Undesignated statutory references are to the Government Code.

[3] While denominated "causes of action" in the operative complaint, injunctive and declaratory relief are remedies, not causes of action. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159.)

adjudication on his retaliation and wrongful termination in violation of public policy causes of action and his claims for declaratory and injunctive relief.[4]

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken from the evidence set forth in the papers filed in connection with the summary judgment motion, except that to which objections were properly made and sustained. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*).) Consistent with the applicable standard of review, we summarize the evidence in the light most favorable to Duke, the party opposing summary judgment, resolving any doubts concerning the evidence in his favor. (*Ibid*.)

A. Duke's Early Employment at Dameron

Duke, a registered nurse, worked at Dameron Hospital for approximately 14 months, from June 6, 2011 until August 3, 2012. He was hired as a clinical manager in the medical-surgical and telemetry departments after being recommended by Alvarez, the director of those departments.[5] As the clinical manager, Duke reported directly to Alvarez. Duke's duties included monitoring the performance of the nurses who worked as unit coordinators in the medical-surgical and telemetry departments, the vast majority of whom were Filipino.

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[4] This is one of six appeals pending before this court by former Dameron nursing employees who reported directly to Alvarez, alleging that they were discriminated against in violation of the FEHA. (See *Kabba v. Dameron Hospital Assn.*, C081090; *Ortiz v. Dameron Hospital Assn.*, C081091; *Galvan v. Dameron Hospital Assn.*, C081092; *Arimboanga v. Dameron Hospital Assn.*, C081249; *Guiao v. Dameron Hospital Assn.*, C081755.)

[5] Alvarez and Duke had previously worked together for six years at another hospital.

B. Alvarez's Statements to Duke About the Unit Coordinators

When Duke was hired, Dameron was attempting to arrange a merger with the University of California Davis Medical Center, and Alvarez advised him that she intended to "get rid" of the Filipino unit coordinators to facilitate the merger. According to Alvarez, the Filipino unit coordinators were "too old and had been there too long," were "dumb," "can't think," "don't speak English," and made "way too much money." At some point, Alvarez provided Duke with the names of individuals she wanted to get rid of, including Shirley Galvan, Jackie Arimboanga, Nancy Ortiz, and Ramatu Kabba, because they "were dumb," "didn't speak English," "didn't represent the face of U.C. Davis," "ma[d]e too much money," and "[w]ere old." Galvin, Arimboanga, and Ortiz are Filipina. All four are foreign-born and speak with thick accents. Duke repeatedly urged Alvarez to "try and understand and . . . work with them."

C. Alvarez's Statements to the Unit Coordinators

At the unit coordinator meetings, Alvarez consistently criticized the unit coordinators' accents, telling them things like, "I don't know how Dameron gets you guys. Your accents are thick. [You] don't know what you are doing." "[T]hose of you with a thick accent, those of you that cannot speak English . . . need to go back to school and learn how to read and write grammar." She also told them that her young son could write better than they could, and that she was there "to clean the house."

D. Augustine Mitchell

Early in Duke's tenure at Dameron, Alvarez directed him to follow an African-American unit coordinator named Augustine Mitchell and gather evidence showing that Mitchell was incompetent so that Alvarez could fire her. Alvarez told Duke that he did not have to worry about being sued for discrimination because he was Black. Duke followed Mitchell and found that she was doing her job properly. When he reported his findings to Alvarez, Alvarez was "disappointed and she was very upset" and said she would find another way to get rid of Mitchell.

E. The Electrocardiogram Test

In July 2012, Alvarez decided to test the unit coordinators in the medical-surgical and telemetry departments on their ability to read an electrocardiogram (EKG). The unit coordinators in the medical-surgical department did not have to read EKGs as a regular part of their jobs, and Duke urged Alvarez to provide a review class to help them prepare. Alvarez rejected his suggestion, explaining, "[T]hey are too dumb, they're Filipinos. Those Filipinos, they are old, they are too dumb. They don't have any brains to learn it anyways. Just let them take it because they're going to flunk so I can get rid of them." As Alvarez predicted, many of the unit coordinators in the medical-surgical department failed the test. The unit coordinators who failed were given an opportunity to retake the test. To Duke's knowledge, no one was fired for failing to pass the EKG test.

F. Nancy Ortiz

Later that same month, Alvarez asked Duke to say that he had seen Ortiz sleeping on the job, a terminable offense, so that Alvarez could "go ahead and fire her." Duke refused "to lie about" something he "did not observe." Alvarez denied asking Duke to lie. Rather, she testified at deposition that another employee, Victoria Hipolito, reported to her that other unnamed employees observed Ortiz running after Duke and either those employees or Hipolito assumed that Duke had caught Ortiz sleeping. Alvarez also testified that Ortiz admitted to her that she had been sleeping, and that Duke had caught her.

G. Duke's Performance Evaluation and Statement That He Wanted to Make a Complaint

On July 31, 2012, Alvarez called Duke into her office around 4:30 p.m. to go over his most recent performance evaluation. Duke did not agree with the rating Alvarez had

given him in a category having to do with "ethical issues."[6] When Duke asked her why she had given him a low score, she said it was because he had lied to her when he denied finding Ortiz sleeping on the job. Duke immediately advised Alvarez that he wanted to make a complaint with human resources (HR) and Janine Hawkins, the chief nursing officer/vice president. Duke told Alvarez, "I have to share what's going on here with Maria [Junez, the HR director] and Janine." When asked if there was a reason "[o]ther than Ms. Alvarez indicating that you had lied and thus giv[ing] you a bad score on ethical issues . . . that you wanted to report her to HR or Ms. Hawkins," Duke testified, "I wanted to bring . . . up all the things that has been going on as far as the name calling, the age, the language issues, . . . just everything that's been going on."

After Duke advised Alvarez that he wanted to make a complaint to HR and Hawkins, Alvarez "picked up the phone and told [him] they were not around." Alvarez then advised him that they would "discuss that at a different time," and said that he should "go ahead and go" to a previously scheduled training in San Francisco.

H. Duke's Termination

When Duke returned to work three days later, on August 3, 2012, he was summoned to HR for a meeting with Alvarez, Junez, and another director. During that meeting, Alvarez provided Duke with a "corrected" version of his evaluation wherein all the fours he had been given on his earlier evaluation had been "changed to much lower numbers." Duke asked, "What is this all about? Is this something that we can discuss?" Junez responded, "No, that's going to take too long," and advised him that he "was relieved of [his] duty as clinical manager" and was "no longer going to work for Dameron Hospital." Duke again asked if they could discuss the matter, and Junez again responded in the negative, indicating that it would "take too long."

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6 The performance evaluation required the evaluator to rate the employee's performance in a number of categories on a scale of one to four, four being the highest.

Duke's termination letter lists three reasons for his termination: (1) failing to report an incident in which he caught an employee (Ortiz) appearing to sleep while watching a patient and later denying having seen the employee appearing to sleep[7]; (2) providing an employee with a "cheat sheet" when the employee was struggling with the EKG exam, but failing to provide another employee with the same when she was struggling with the exam[8]; and (3) responding to his most recent evaluation with an "angry outburst in which [he] utilized invasion of personal space and glaring [at Alvarez] in an attempt to intimidate [her]."[9] According to the letter, such behavior failed to

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[7] The termination letter summarizes this incident as follows: "You failed to report an incident in which you caught an employee appearing to sleep while watching a patient. After several employees came to me to report that you caught the individual sleeping, I questioned you about the incident, of which you failed to inform me. You denied that you saw the individual sleeping. The employee herself volunteered to me that you had caught her sleeping. Again, I questioned you and you admitted seeing her in the room but would not state that she was sleeping or appeared to be sleeping. This situation calls into question your truthfulness, a reflection of integrity."

[8] The termination summarizes this incident as follows: "On July 31, 2012, I discovered you provided Domingo Mose with a cheat sheet to help him with his ECG [*sic*] exam when he was struggling with this but failed to provide it to Barbara Minor when she was struggling with the exam. This preferential treatment of employees in contrary to the expectations of a leader at Dameron Hospital. In addition, employees were expected to take the exam without prompts or help[] from the exam proctor. You were aware of this and since this had been a problem in the past, I had asked that you, Karen Shurb and Barbara Yarbrough be the exam proctors rather than unit coordinators. You have failed to follow my instructions (insubordination) and to meet the standards of leadership and integrity."

[9] The termination letter summarizes this incident as follows: "On July 31, 2012, you responded in your evaluation session with an angry outburst in which you utilized invasion of personal space and glaring in an attempt to intimidate me. This is not the first instance in which you have responded in appropriately to a situation that is not to your liking. I have observed this behavior when you deal with patients, insubordinates [*sic*], peers and me. I have discussed this with you in the past, and yet the problematic behaviors continue. This behavior is contrary to the values of Dameron Hospital and a healthy work environment."

comply with the code of conduct standards and demonstrated dishonesty and insubordination.

Duke presented evidence disputing all three reasons given for his termination. He denied finding Ortiz sleeping on the job. Rather, he testified that he saw her watching television while sitting with a patient, and told Alvarez about the incident. Duke denied assisting any employee during the EKG exam. Rather, he testified that he provided employees with training materials prior to the exam to help them prepare. Finally, Duke testified that he did not raise his voice, yell, glare at, or sit close to Alvarez during his evaluation.

I. The Underlying Action and Summary Judgment Proceedings

On July 9, 2013, the FEHA sent Duke a "Right to Sue" notice. Thereafter, he filed the instant action. Dameron moved for summary judgment, or in the alterative summary adjudication. Dameron argued that Duke could not establish a prima facie case of retaliation because he could not show that he engaged in a protected activity or establish a causal link between any such activity and his termination. Even assuming that Duke could establish a prima facie case, Dameron claimed that it had legitimate, nonretaliatory reasons for his termination, which Duke could not show to be pretextual. Because Duke was not retaliated against, Dameron asserted that he could not establish that he was wrongfully terminated. Dameron also argued that Duke's claims for declaratory and injunctive relief could not stand because he had no intent to return to Dameron, and that Duke was not entitled to punitive damages because none of the alleged wrongdoers were "managing agents" for Dameron.

The trial court granted summary judgment in Dameron's favor. It found that Dameron showed that Duke could not establish that he engaged in a protected activity because "he did not indicate to Alvarez that the complaints and opposition he made to her

were related to an employment practice proscribed by the FEHA,"[10] and that his wrongful termination cause of action, claims for declaratory and injunctive relief, and request for punitive damages were derivative of the retaliation cause of action, and thus, entered summary judgment on those as well.

DISCUSSION

A motion for summary judgment must be granted if the submitted papers show there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) The moving party initially bears the burden of making a "prima facie showing of the nonexistence of any genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.) As applicable here, a defendant moving for summary judgment can meet its burden of showing that a cause of action has no merit by showing that one or more elements of the cause of action cannot be established. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has met its burden, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to the cause of action. (*Ibid*.)

We review de novo the record and the determination of the trial court. First, we identify the issues raised by the pleadings, since it is those allegations to which the motion must respond. Second, we determine whether the moving party's showing has

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10 Dameron incorrectly asserts that "[t]he trial court . . . determined that Duke could not make out a prima facie case of retaliation because it was undisputed he made no complaint to Human Resources or Janine Hawkins, Alvarez's supervisor, regarding Alvarez's alleged discriminatory conduct." The trial court made no such determination. Moreover, as detailed *post*, Duke was not required to show that he complained to HR or Hawkins about Alvarez's conduct so long as he produced evidence showing that Alvarez knew that his opposition was based upon Duke's reasonable belief that she was engaging in discriminatory conduct.

established facts negating the opponent's claims and justifying a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the final step is to determine whether the opposition demonstrates the existence of a triable, material issue of fact. (*Barclay v. Jesse M. Lange Distributor, Inc.* (2005) 129 Cal.App.4th 281, 290.)

I

The Trial Court Erred In Granting Summary Judgment on Duke's Retaliation Cause of Action

Duke contends that the trial court erred in granting summary judgment on his retaliation cause of action because there was sufficient evidence that Alvarez was aware that he was opposing practices that he reasonably believed were forbidden by the FEHA when he advised her that he wanted to complain to HR and Hawkins. More particularly, he asserts that a trier of fact "could reasonably find that [his] demand to file a complaint with HR and Vice President Hawkins sufficiently conveyed to Alvarez that he could and would raise the larger issue of her pattern of discriminatory conduct against the [unit coordinators]." Dameron responds that the trial court properly determined that Duke did not engage in a protected activity because "telling Alvarez he wanted to complain about his integrity score does not constitute opposition under the FEHA," and even if it did, summary judgment still was properly entered because Duke cannot establish a causal connection between the alleged protected activity and his termination, and, in any event, Dameron had legitimate, nonretaliatory reasons for his termination.

Section 12940, subdivision (h) makes it an unlawful employment practice "[f]or any employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part." "[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity

and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ' " 'drops out of the picture,' " ' and the burden shifts back to the employee to prove intentional retaliation." (*Yanowitz, supra,* 36 Cal.4th at p. 1042.)

This framework is modified in the summary judgment context: " '[T]he employer, as the moving party, has the initial burden to present admissible evidence showing either that one or more elements of plaintiff's prima facie case is lacking or that the adverse employment action was based upon legitimate, nondiscriminatory factors.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 861.) "If the employer meets its initial burden, the burden shifts to the employee to 'demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus*, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action.' " (*Ibid.*)[11]

A. Duke Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That He Engaged in a Protected Activity

"The statutory language of section 12940[, subdivision] (h) indicates that protected conduct can take many forms." (*Yanowitz, supra,* 36 Cal.4th at p. 1042.) "Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the

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[11] We shall assume for purposes of appeal that Dameron presented admissible evidence showing either that one or more elements of Duke's prima facie case is lacking. (*Serri v. Santa Clara University, supra,* 226 Cal.App.4th at p. 861.)

employer was engaging in discrimination." (*Id.* at p. 1046.) "[C]omplaints about personal grievances or vague or conclusory remarks . . . will not suffice to establish protected conduct." (*Id.* at p. 1047.)

But an employee need not explicitly and directly inform his employer that he believes the employer's conduct was discriminatory or otherwise forbidden under the FEHA. (*Yanowitz, supra*, 36 Cal.4th at p. 1046.) " '[A]n employee is not required to use legal terms or buzzwords when opposing discrimination. The court will find opposing activity if the employee's comments, when read in their totality, oppose discrimination.' [Citation.]" (*Id.* at p. 1047.) " 'The relevant question . . . is not whether a formal accusation of discrimination is made but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.' [Citation.]" (*Ibid.*) Moreover, the FEHA need not actually prohibit the conduct that the employee opposes. "[A]n employee's conduct may constitute protected activity for purposes of the antiretaliation provision of the FEHA . . . when the employee opposes conduct that the employee reasonably and in good faith believes to be discriminatory, whether or not the challenged conduct is ultimately found to violate the FEHA." (*Id.* at p. 1043.)

In *Yanowitz*, the plaintiff's male supervisor ordered her to terminate a female sales associate in a retail store because the supervisor found the associate was not sufficiently attractive. (*Yanowitz, supra*, 36 Cal.4th at p. 1038.) The plaintiff asked her supervisor for an "adequate justification" before she would terminate the associate. (*Ibid.*) On several subsequent occasions, the supervisor asked the plaintiff whether the associate had been dismissed, and the plaintiff asked the supervisor to provide "adequate justification" for dismissing the associate. (*Ibid.*) The plaintiff ultimately refused to terminate the sales associate. (*Ibid.*) The plaintiff never complained to HR or to anyone else that the supervisor was pressuring her to fire the sales associate; nor did she explicitly tell the supervisor that she believed his order was discriminatory. (*Ibid.*) Our Supreme Court

held that "a trier of fact properly could find that [the supervisor's] order constituted discrimination on the basis of sex—that is, the application of a different standard to a female employee than that applied to male employees—and that her opposition to the directive thus was not merely an unexplained insubordinate act bearing no relation to suspected discrimination. [Citation.] A trier of fact properly could find that by repeatedly refusing to implement the directive unless [the supervisor] provided 'adequate justification,' [the plaintiff] sufficiently conveyed to [the supervisor] that she considered the order to be discriminatory and put him on notice that he should reconsider the order because of its apparent discriminatory nature. [¶] In sum, [the court] conclude[d] that the evidence presented by [the plaintiff] would permit—although it certainly would not compel—a reasonable trier of fact to find that, in view of the nature of [the supervisor's] order, coupled with [the plaintiff's] multiple requests for 'adequate justification,' sufficiently communicated to [the supervisor] that she believed that his order was discriminatory." (*Id.* at p. 1048.)

Likewise, here, the evidence would allow a reasonable trier of fact to conclude that Alvarez's request that Duke lie and say that he observed Ortiz sleeping on the job so that Alvarez could terminate her because she was "too old" and Filipino constituted discrimination on the basis of national origin and age, and that Duke's refusal to go along with Alvarez's plan "thus was not merely an unexplained insubordinate act bearing no relation to suspected discrimination." (*Yanowitz, supra,* 36 Cal.4th at p. 1048.) A trier of fact properly could find that Duke's statement that he wanted to complain to HR and Hawkins and "share what's been going on here," included Alvarez's efforts to "get rid" of Ortiz and the other Filipino unit coordinators. Duke made the statement immediately after Alvarez explained that she had given him a low score for "ethical issues" because he had lied when he denied seeing Ortiz sleeping on the job. Given the context in which the statement was made, coupled with Alvarez's history of making disparaging statements about the Filipino unit coordinators, including Ortiz, to Duke, her efforts to get rid of

them, and Duke's history of not going along with Alvarez's plan, a reasonable trier of fact could conclude that Alvarez understood that Duke's opposition was not limited to his ethics rating, but rather, encompassed Alvarez's efforts to get rid of the Filipino unit coordinators, including Ortiz. Moreover, Alvarez's statement to Duke that he did not have to worry about being sued for discrimination because he is Black suggests that Alvarez knew that her efforts to get rid of certain employees could be construed as discriminatory. Finally, as Duke points out, his low ethics rating resulted from his refusal to falsely accuse Ortiz, a Filipino unit coordinator, of sleeping on the job. Had Duke gone along with Alvarez and falsely accused Ortiz, Alvarez would have used his lie to fire Ortiz in furtherance of her plan to get rid of the older, Filipino unit coordinators whom she viewed as "dumb," "too old," and unable to speak English. A trier of fact reasonably could conclude that Duke's refusal to lie about Ortiz in order for Alvarez to fire Ortiz based on Ortiz's age and national origin constituted opposition to a practice Duke reasonably believed violated the FEHA.

Thus, Duke presented sufficient evidence to satisfy the protected activity element of his prima facie case.

B. Duke Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That There Is a Causal Link Between the Alleged Protected Activity and His Termination

Should we conclude, as we have, that Duke presented sufficient evidence to satisfy the protected activity element of his prima facie case, Dameron contends that summary judgment nevertheless was properly granted because Duke cannot establish the third element of his prima facie case—a causal link between his protected activity and his termination. We disagree.

Duke was terminated *three days* after telling Alvarez that he wanted to file a complaint, and immediately after returning to work from a conference in San Francisco. "Proximity in time between the employee's activity and the adverse employment action

satisfies the employee's prima facie burden." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1048-1049.)

C. Duke Presented Sufficient Evidence to Allow a Reasonable Trier of Fact to Find That Dameron's Legitimate, Nonretaliatory Reasons for His Termination Were a Pretext for Retaliation

Once an employee establishes a prima facie case of retaliation, the burden shifts to the employer to articulate a legitimate, nonretaliatory explanation for the adverse employment action. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 140; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 475-476 (*Flait*).) "In this context, 'legitimate' reasons 'are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*.' " (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 673.) Dameron presented evidence that Duke was terminated because he (1) failed to report that Ortiz was sleeping on the job; (2) provided assistance to one employee and not another during the EKG exam; and (3) attempted to intimidate Alvarez during his performance evaluation. Dameron's asserted reasons are sufficient to permit a trier of fact to conclude that its employment decision may not have been motivated by retaliatory animus. (*Flait,* at p. 479.)

"Once the employer meets its burden, the burden then shifts back to the plaintiff to prove the employer's proffered reasons for termination are pretextual. [Citation.] ' "[T]he plaintiff may establish pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.' " ' [Citation.]" (*Mokler v. County of Orange, supra,* 157 Cal.App.4th at p. 140.) "Pretext may also be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Flait, supra,* 3 Cal.App.4th at p. 479.)

Duke presented evidence that Dameron's proffered reasons were untrue and that unlawful retaliation was the true reason for his termination. As detailed above, Duke presented evidence that he did not observe Ortiz sleeping on the job, did not assist anyone during the EKG exam, and did not attempt to intimidate Alvarez during his performance evaluation. In addition, Duke was terminated three days after he advised Alvarez that he wanted to complain to HR and Hawkins. Moreover, before Duke indicated that he wanted to complain, Alvarez rated his performance a "4" in numerous categories; after he complained, she lowered all of those ratings. Finally, the evidence showed that the decision to terminate Duke was based almost entirely on information provided by Alvarez. In sum, Duke produced evidence sufficient to allow a reasonable trier of fact to find that the stated reasons were untrue and that Dameron, through its supervisor, Alvarez, acted with a retaliatory animus, and that such animus was a substantial motivating factor in Duke's termination.

II

The Trial Court Erred In Granting Summary Judgment on Duke's Wrongful Termination In Violation of Public Policy Cause of Action

The trial court granted summary judgment on Duke's wrongful termination cause of action after finding that Duke could not make out a prima facie case for retaliation. Duke appeals, contending that because the trial court erred in ruling that he could not make out a prima facie case for retaliation, it also erred in holding that he cannot prevail on his wrongful termination cause of action. We agree.

"[A]n employer's traditional broad authority to discharge an at-will employee 'may be limited by statute . . . or by considerations of public policy.' " (*Tameny v. Atlantic Richfield Co., Inc.* (1980) 27 Cal.3d 167, 172.) In *Tameny,* the court held that an employee discharged for refusing to engage in illegal conduct at his employer's request may bring a tort action for wrongful discharge. The court reasoned that "the relevant authorities both in California and throughout the country establish that when an

employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Id.* at p. 170.) "[C]ourts in *wrongful discharge actions* may not declare public policy without a basis in either constitutional or statutory provisions. A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1095.)

As detailed above, Duke presented evidence sufficient to raise a triable issue as to whether he was retaliated against for opposing a practice prohibited under the FEHA. "The FEHA is a statute which clearly states a public policy against discrimination . . . ." (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 130-132.) The FEHA also reflects a public policy prohibiting retaliation against an employee for opposing discriminatory practices. (§ 12940, subd. (h).) Accordingly, the trial court erred in granting summary judgment on Duke's wrongful termination in violation of public policy cause of action.

III

The Trial Court Erred In Granting Summary Judgment on Duke's Declaratory and Injunctive Relief Claims

The trial court granted summary judgment on Duke's injunctive and declaratory relief claims on the ground that they are derivative of his other causes of action which it found could not survive summary judgment. On appeal, Duke contends that "since the underlying causes of action should have survived, so must the claims for declaratory and injunctive relief." We agree.

" '[U]pon a finding of unlawful discrimination, a court may grant injunctive relief where appropriate to stop discriminatory practices.' " (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 234.) The same is true with respect to declaratory relief. "[P]roof

that an adverse employment decision was substantially motivated by discrimination may warrant a judicial declaration of employer wrongdoing." (*Ibid.*)

We have concluded that summary judgment was improperly granted on Duke's retaliation cause of action, and Dameron has failed to show that Duke is not entitled to declaratory or injunctive relief as a matter of law. Accordingly, the trial court erred in granting summary judgment on Duke's claims for declaratory and injunctive relief.

IV

Summary Judgment Was Properly Entered on Duke's Claim for Punitive Damages

Duke contends that because his retaliation and wrongful termination causes of action should survive summary judgment, so should his request for punitive damages. We disagree.

Civil Code section 3294, subdivision (a) provides: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Subdivision (b) of that section states: "An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her in conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. *With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation.*" (Italics added.) A managing agent is "someone who exercises substantial discretionary authority over decisions that ultimately determine corporate policy." (*White v. Ultramar* (1999) 21 Cal.4th 563, 573 (*White*).)

Here, the trial court determined that "[s]ince none of [Duke's] causes of action survive this motion, he will not be able to prove or receive actual damages," so punitive damages are likewise unavailable. We have concluded that Duke's retaliation and wrongful termination in violation of public policy causes of action shall survive summary judgment. Accordingly, the basis for the trial court's ruling is no longer valid. We may affirm, however, on any ground supported by the record. (*Jimenez v. County of Los Angeles* (2005) 130 Cal.App.4th 133, 140.)

Dameron argued below that summary judgment of Duke's claim for punitive damages is appropriate because "none of the alleged wrongdoers named in [the] complaint were managing agents for defendant [Dameron]." Among other things, Dameron presented evidence that neither Alvarez nor Junez "autonomously set policy for Dameron Hospital Association," Alvarez did not "exercise substantial independent authority over a significant portion of [Dameron's] business," and Junez "only exercises discretion and authority within Human Resources under the oversight of the Vice President of Human Resources." In response, Duke failed to point to any evidence that would support a finding that Alvarez or Junez were managing agents. Rather, Duke asserted that "[w]hether Ms. Alvarez's level of authority raises to the level of managing agent or that her conduct was ratified by Defendant, for purposes of punitive damages, is for a jury to determine based on the facts." In the context of a summary judgment motion, where, as here, Dameron made a prima facie showing that Duke cannot establish an element of the cause of action, Duke was required to produce evidence sufficient to create a triable issue of material fact. He failed to do so.

As for Junez, Duke cited to Junez's "overall role in terminations, investigations and oversight." Such evidence is insufficient to create a triable issue on whether Junez

was a managing agent.[12] "[S]upervisors who have no discretionary authority over decisions that ultimately determine corporate policy would not be considered managing agents even though they may have the ability to hire or fire other employees. In order to demonstrate that an employee is a true managing agent under [Civil Code] section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.) Duke failed to produce evidence that would allow a reasonable trier of fact to conclude that Junez exercised such authority. Accordingly, the trial court properly granted summary judgment on Duke's claim for punitive damages.

V

The Trial Court Abused Its Discretion In Excluding Certain Evidence

The trial court sustained without explanation 88 of Dameron's 91 objections to Duke's evidence. On appeal, Duke challenges the trial court's ruling as to 59 of those objections. We shall limit our review to those evidentiary rulings that pertain to evidence that is material to our resolution of the issues raised on appeal, and we shall review those rulings for an abuse of discretion. (*Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.)

Dameron does not respond to Duke's individual arguments; rather, it responds generally that its objections "were properly targeted to exclude evidence describing the treatment of Duke's Filipino co-workers" and that "[s]uch issues bore no rational relationship to Duke's retaliation or wrongful termination claims." According to

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[12] Duke also asserted generally that "Junez testified to her direct involvement in drafting policies and procedures." The evidence cited, however, does not support his assertion. In any event, having direct involvement in drafting unspecified policies and procedures is insufficient to show that someone is a managing agent. (*White, supra,* 21 Cal.4th at pp. 573, 577.)

Dameron, "[t]he important issue in Duke's retaliation claim was not whether Alvarez displayed discriminatory animus, but whether Duke engaged in a protected activity by reporting what he believed to be violations of the FEHA." As set forth above, in order to establish that he engaged in a protected activity, Duke must show that he opposed conduct that he reasonably and in good faith believed was discriminatory. (*Yanowitz, supra,* 36 Cal.4th at p. 1043.) Evidence Alvarez harbored a discriminatory animus toward the Filipino unit coordinators and planned to "get rid of them" tends to show that Duke reasonably believed that Alvarez engaged in discriminatory conduct.

Turning to the evidentiary rulings themselves, the trial court sustained Dameron's objection Nos. 28-33 to Duke's deposition testimony recounting statements made by Alvarez about the unlikelihood of the Filipino unit coordinators passing the EKG exam. Dameron objected to this evidence on hearsay and relevance grounds. This testimony is not hearsay because it was not offered for the truth of the matter asserted, i.e., that the Filipino unit coordinators lacked the intelligence to pass the EKG test. (Evid. Code, § 1200.) In any event, the statements would not be made inadmissible by the hearsay rule because they were made by a party opponent. (Evid. Code, § 1220.) Although Alvarez is not named as a defendant in any of Duke's causes of action, her involvement in Duke's termination renders her remarks admissible as a statement of a party. (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1150 (*Colarossi*).) Dameron's relevance objection is based on the erroneous assumption that Duke "did not engage in a protected activity." As detailed above, a triable issue exists as to whether Duke engaged in a protected activity, and Alvarez's statements are relevant because they reveal a discriminatory animus. The trial court abused its discretion in sustaining Dameron's objection Nos. 28-33.

The trial court sustained Dameron's objection Nos. 38-41, 45-46, and 52-57 to Duke's deposition testimony recounting various disparaging statements made by Alvarez about the Filipino unit coordinators and her plan to get rid of them. Dameron objected to

this evidence on hearsay and relevance grounds. Much of the challenged testimony is not hearsay because it was not offered for the truth of the matter asserted, i.e., that the Filipino unit coordinators are "too old," "had been there too long," "don't speak English," and "ma[de] too much money." (Evid. Code, § 1200.) In any event, the statements would not be made inadmissible by the hearsay rule because they were made by a party opponent. (Evid. Code, § 1220; *Colarossi, supra,* 97 Cal.App.4th at p. 1150.) Dameron's relevance objection is based on the erroneous assumption that Duke "did not engage in a protected activity." As detailed above, a triable issue exists as to whether Duke engaged in a protected activity, and Alvarez's statements are relevant because they reveal a discriminatory animus. The trial court abused its discretion in sustaining Dameron's objections thereto.

The trial court sustained Dameron's objection Nos. 49-51 to Duke's deposition testimony that Alvarez instructed him to follow Mitchell to build a case against her to prove that she was incompetent. Dameron objected to this evidence on hearsay and relevance grounds. Alvarez's instructions to Duke would not be made inadmissible by the hearsay rule because they were made by a party opponent. (Evid. Code, § 1220; *Colarossi, supra,* 97 Cal.App.4th at p. 1150.) Dameron's relevance objection is based on the erroneous assumption that Duke "did not engage in a protected activity." As detailed above, a triable issue exists as to whether Duke engaged in a protected activity, and the evidence is relevant because it supports Duke's claim that Alvarez attempted to enlist his help in getting rid of certain unit coordinators, which in turn is relevant to whether he reasonably believed that Alvarez engaged in discriminatory conduct. The trial court abused its discretion in excluding this evidence.

The trial court sustained Dameron's objection No. 59 to Alvarez's deposition testimony that the racial makeup of unit coordinators at the time in question "was 99 percent Filipino and one percent Japanese or Chinese." Dameron objected to the testimony on relevance grounds and as speculative. Dameron's relevance objection is

based on the erroneous assumption that Duke "did not engage in a protected activity." As detailed above, a triable issue exists as to whether Duke engaged in a protected activity, and this testimony is relevant because it tends to show that the disparaging statements Alvarez made during the unit coordinator meetings were directed at the Filipino unit coordinators because the vast majority of those present were Filipino. As the director of the medical-surgical and telemetry departments, Alvarez had direct knowledge of the racial makeup of the unit coordinators. While her testimony may not be 100 percent accurate, it is not speculative. The trial court abused its discretion in excluding it.

Finally, the trial court sustained Dameron's objection No. 83 to Kabba's deposition testimony that Alvarez said "those of you with a thick accent, those of you that cannot speak English . . . need to go back to school and learn how to read and write grammar," she did "not know where Dameron gets [the unit coordinators] from," and "she's there to clean house." Dameron objected to this testimony on hearsay and relevance grounds. This testimony is not hearsay because it was not offered for the truth of the matter asserted, i.e., that the unit coordinators with thick accents could not speak English and needed to go back to school. (Evid. Code, § 1200.) In any event, the statements would not be made inadmissible by the hearsay rule because they were made by a party opponent. (Evid. Code, § 1220; *Colarossi, supra,* 97 Cal.App.4th at p. 1150.) Dameron's relevance objection is based on the erroneous assumption that Duke "did not engage in a protected activity." As detailed above, a triable issue exists as to whether Duke engaged in a protected activity, and Alvarez's statements are relevant because they reveal a discriminatory animus. The trial court abused its discretion in sustaining Dameron's objection thereto.

DISPOSITION

The judgment is reversed. On remand, the trial court is directed to vacate its order granting the motion for summary judgment and to enter a new order granting the motion for summary adjudication as to the negligent supervision cause of action and the request

for punitive damages, but denying the motion for summary adjudication as to the retaliation and wrongful termination in violation of public policy causes of action and the claims for declaratory and injunctive relief. In light of our rulings in this and several other appeals by former Dameron nursing employees who reported directly to Alvarez, we further direct the trial court to reassign this matter to a different judge. Duke shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

/s/
BLEASE, Acting P. J.

We concur:

/s/
ROBIE, J.

/s/
DUARTE, J.